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No. 95-1181

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

v.

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed January 23, 1996
Certiorari Granted May 28, 1996

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The following opinion, orders, and brief have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition For A Writ Of Certiorari ("Pet. App."):

Appendix A:	Opinion of the United States Court of Appeals for the Second Circuit (June 23, 1995)	Pet. App. 1a
Appendix B:	Order of the United States District Court for the Southern District of New York (June 23, 1994) and Memorandum (July 1, 1994)	Pet. App. 1b
Appendix C:	Order of the United States Court of Appeals for the Second Circuit Denying the Petition for Rehearing and Suggestion for Rehearing In Banc (September 22, 1995) ..	Pet. App. 1c
Appendix D:	Brief for the United States as <i>Amicus Curiae</i> in <i>Salomon Forex, Inc. v. Tauber</i> , No. 92-1406 (4th Cir.).....	Pet. App. 1d

RELEVANT DOCKET ENTRIES

1. Respondent's Complaint filed 4/08/94
 2. Petitioners' Motion to Dismiss filed 6/15/94
 3. District Court's Order Appointing
Temporary Equity Receiver dated 6/23/94
 4. District Court's Order Noting Subject
Matter Jurisdiction dated 7/01/94
 5. Notice of Appeal filed 7/27/94
 6. Second Circuit's Opinion filed 6/23/95
 7. Petition for Rehearing and Suggestion for
Rehearing In Banc filed 8/04/95
 8. Second Circuit's Order Denying Petition
for Rehearing and Suggestion for
Rehearing In Banc dated 9/22/95
 9. Petition for Writ of Certiorari filed 1/23/96
 10. Grant of Petition for Writ of
Certiorari dated 5/28/96
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x		94 CIV. 2403
COMMODITY FUTURES	:	COMPLAINT
TRADING COMMISSION,	:	FOR EX PARTE
	:	ORDER,
Plaintiff,	:	TEMPORARY
	:	RESTRAINING
v.	:	ORDER,
WILLIAM C. DUNN, DELTA	:	PRELIMINARY
CONSULTANTS, INC. DELTA	:	AND
OPTIONS, Ltd., and NOPKINE	:	PERMANENT
CO., LTD.,	:	INJUNCTIONS
	:	AND
Defendants.	:	ANCILLARY
	:	EQUITABLE
	:	RELIEF FOR
	:	VIOLATIONS OF
	:	THE
	:	COMMODITY
	:	EXCHANGE
	:	ACT, AS
	:	AMENDED, 7
	:	U.S.C. § 1, ET
	:	SEQ. (SUPP. IV
	:	1992) AND THE
	:	REGULATIONS
-----x		THEREUNDER.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COMMODITY FUTURES	:	COMPLAINT
TRADING COMMISSION,	:	FOR EX PARTE
	:	ORDER,
Plaintiff,	:	TEMPORARY
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WILLIAM C. DUNN, DELTA	:	AND
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	:	THEREUNDER.
-----x		

1. Plaintiff Commodity Futures Trading Commission, an independent regulatory agency of the United States, hereby alleges that defendants William C. Dunn, Delta Consultants, Inc., Delta Options, Ltd., and Nopkine Co. Ltd. (collectively, "the Defendants"), have engaged, are engaging and, unless restrained and enjoined, will

continue to engage in acts and practices which constitute violations of Section 4c(b) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6c(b) (Supp. IV 1992), and Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993).

2. Accordingly, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (Supp. IV 1992), the Commission brings this action to restrain and enjoin such acts and practices, to compel compliance with the provisions of the Act, and to obtain the ancillary relief prayed for and seek such further relief as this Court deems just and appropriate, including, but not limited to, a freeze of the Defendants' assets, appointment of a receiver, and preservation of, and access to, the Defendants' books and records.

I.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (Supp. IV 1992), authorizing the Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice which constitutes a violation of any provision of the Act or the Regulations.

4. Under Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (Supp. IV 1992), this Court is empowered, among other things, to enter an *ex parte* order (a) prohibiting destruction, alteration or disposal of books and records, (b) freezing the assets of any person or firm who is or may be violating the Act or Regulations and (c) appointing a temporary equity receiver.

3. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (Supp. IV 1992), in that the Defendants are found in, inhabit, or transact business in the Southern District of New York, and the acts and practices in violation of the Act have occurred, are occurring, and are about to occur within the Southern District of New York, among other places.

II.

PARTIES

PLAINTIFF

6. The *Commodity Futures Trading Commission* ("Commission") is an independent regulatory agency of the United States which is charged with responsibility for administering and enforcing the provisions of the Commodity Exchange Act, as amended. The Commission maintains its principal office at 2033 K Street, NW., Washington, D.C. 20581.

DEFENDANTS

7. *William C. Dunn* ("Dunn") is (a) president and sole shareholder of defendant *Delta Consultants, Inc.*, (b) advisor to, and the former managing director of, defendant *Delta Options, Ltd.*, and (c) advisor to defendant *Nopkine Co. Ltd.* Dunn resides at 20 Mountainside Road, Mendham, New Jersey 07945. He is not now, and never has been, registered with the Commission in any capacity.

8. *Delta Consultants, Inc.* ("Delta Consultants") is a New Jersey corporation which was formed by Dunn in 1974 and maintains its principal place of business at Jockey Hollow Professional Park, Suite #16, Cold Hill

Road, Mendham, New Jersey 07945. *Delta Consultants* is not now, and never has been, registered with the Commission in any capacity.

9. *Delta Options, Ltd.* ("Delta Options"), is an unregulated investment company which was incorporated in the Bahamas in 1991. *Delta Options* uses as its mailing address P.O. Box N-8865, Nassau, Bahamas. It is not now, and never has been, registered with the Commission in any capacity.

10. *Nopkine Co. Ltd.* ("Nopkine") is an unregulated investment company which was incorporated in the British Virgin Islands in 1993. *Nopkine* uses as its mailing address P.O. Box 3149, Pasea Estate, Road Town, Tortola, British Virgin Islands. Promotional materials distributed to prospective customers of *Nopkine* describe Dunn as a trading advisor to, and as a "key person" of, *Nopkine*. *Nopkine* is not now, and never has been, registered with the Commission in any capacity.

III.

GENERAL ALLEGATIONS

11. Since 1992, Dunn, *Delta Consultants* and *Delta Options*, acting directly and through marketing agents under their supervision and control, have solicited and accepted, and continue to solicit and accept, funds for investment with *Delta Options* from customers in the United States and abroad. At least some of these funds have been deposited in accounts carried in the name of *Delta Options* at banks in New York City.

12. The funds referred to in paragraph 11 are commingled and used by Dunn, Delta Consultants and Delta Options for, among other purposes, purchasing and writing "put" options and "call" options on commodities regulated under Section 1a(3) of the Act, 7 U.S.C. § 1a(3) (Supp. IV 1992), including, but not necessarily limited to, options on Japanese yen, Australian dollars, German marks, British pounds, Canadian dollars and Swiss francs, in connection with various "investment strategies" managed by Delta Options and advised by Dunn and Delta Consultants. As compensation for its services, Delta Options receives 30% of all realized trading profits, in the form of an incentive fee.

13. By way of example, one "investment strategy" described to Delta Options customers involves the purchase of purportedly hedged baskets of out-of-the-money "call" options and "put" options involving three or more currencies with maturity dates several months forward. The positions thus established are subsequently liquidated by writing "call" and "put" options close to expiration. At least some of these option transactions have been executed between Delta Options, on the one hand, and banks in New York City, on the other.

14. On or about July 1, 1993, Dunn, acting in his capacity as president of Delta Consultants, claimed to be managing at least \$180 million in customer funds which had been invested with Delta Options. On or about November 26, 1993, Dunn and Delta Consultants advised Delta Options that its customers had suffered losses of \$95 million, a fact which previously had been undisclosed.

15. Since at least July 1993, Dunn and Nopkine, acting directly and through marketing agents under their supervision and control, have solicited and accepted, and continue to solicit and accept, funds for investment with Nopkine from customers in the United States and abroad.

16. The funds referred to in paragraph 15 are commingled and used by Dunn and Nopkine for, among other purposes, purchasing and writing "put" options and "call" options on commodities regulated under Section 1a(3) of the Act, 7 U.S.C. § 1a(3) (Supp. IV 1992), including, but not limited to, options on Japanese yen, Australian dollars, German marks, British pounds, Canadian dollars and Swiss francs, in connection with trading activities carried out by Nopkine and advised by Dunn. As compensation for its services, Nopkine receives 30% of all realized trading profits, in the form of an incentive fee.

17. Upon information and belief, as of September 21, 1993, Nopkine was managing at least \$44 million in customer funds.

18. At all times relevant hereto and continuing to the present, Dunn has made or participated in all decisions concerning the use of customer funds invested with Delta Options and Nopkine, including, but not limited to, all trading decisions.

19. Upon information and belief, Dunn, Delta Consultants, Delta Options and Nopkine, at all times relevant hereto and continuing to the present, either (a) did not make or (b) made, but did not keep, systematic trading, financial and other records reflecting the receipt and use of customer funds.

IV.

VIOLATIONS OF THE COMMODITY EXCHANGE
ACT AND THE REGULATIONS

COUNT ONE

VIOLATIONS OF SECTION 4c(b) OF THE ACT AND
COMMISSION REGULATION 32.9: FRAUD IN CON-
NECTION WITH COMMODITY OPTION TRANSAC-
TIONS

20. The allegations set forth in paragraphs 1 through 19 are realleged and incorporated herein by reference.

21. Pursuant to Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), no person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under the Act which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

22. Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993), makes it unlawful for any person, directly or indirectly, to (a) cheat or defraud or attempt to cheat or defraud any other person, (b) make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof, or (c) deceive or attempt to deceive any other person by any means whatsoever, in or in connection

with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction.

23. Since 1992, in marketing "investment strategies" involving the purchase and writing of options on foreign currencies, Dunn, Delta Consultants and Delta Options have made false, misleading and/or deceptive representations to existing and prospective customers concerning, among other things, (a) the likelihood of profit, and the risk of loss, associated with trading options on foreign currencies, (b) the nature of the "investment strategies" being marketed by them and (c) the true status of the funds invested with Delta Options, including, but not limited to, the following:

- A. A statement, made in one or more explanatory memoranda distributed to customers of Delta Options in 1992 and 1993, that "returns in a volatile year can range from 35% to 50% p.a. and in a poor year from 10%-20% p.a. This does not take account of the extra gains to be made from 'rolling' from one strangle position to another."
- B. A statement, made in one or more explanatory memoranda distributed to customers of Delta Options in 1992 and 1993, that Delta Consultants "[is] prepared to guarantee 90% of investor's capital and to advise clients should a 2.5% loss result before continuing with the investment. Again, the risk of this is low as funds are only committed gradually as profit builds up."
- C. A statement, made in one or more explanatory memoranda distributed to customers

of Delta Options in 1992 and 1993, that "[t]here are few if any investments which can provide such high returns with reasonable consistency using essentially a low risk strategy."

- D. A statement, made in one or more explanatory memoranda distributed to customers of Delta Options in 1992 and 1993, that the "currency investment opportunities" being offered to them have "potential gross yields" of from 15 to 35% and "carry relatively low risk."
- E. Statements, routinely made to customers of Delta Options as their funds were invested in specific positions maturing on denominated dates, that Delta Options would (i) notify them immediately when the position showed a loss of 2.5%, (ii) discuss the position with them if the loss level reached 2.5, 5.0 and 7.5%, and (iii) close the position when the loss reached 10%.
- F. Statements, made in written reports distributed to customers of Delta Options *after* at least several customers had expressed concern over the safety of their funds, (i) that the principal invested in the position maturing on September 27, 1993, and all profits, had been, or were being, remitted to customers and (ii) that the customers whose funds had been invested in the position maturing on September 27, 1993, would receive a return of 11.0% on invested funds and 5.0% on uninvested funds.
- G. Statements, made on or about October 12, 1993, to all customers of Delta Options, that

they would be repaid "in full, plus all profits."

- H. A statement, made in a written communication dated October 30, 1993, from Delta Consultants to Delta Options, that "sufficient funds are available to repay all [Delta Options] investors with profits."
- I. A statement, made in a written communication dated November 7, 1993, from Dunn to the customers of Delta Options that "[t]he initial objective of safeguarding investor funds with the profits intact is still being met. . . ."

24. At the time the statements referred to in paragraph 23 were made, Dunn, Delta Consultants and Delta Options either knew the statements were false or had no reason to believe they were true. For example, despite the representations referred to in paragraph 23, a number of Delta Options customers whose funds were invested in positions purportedly maturing on August 27, 1993 and September 27, 1993, have not been repaid in full and have not received any profits.

25. Since 1993, in marketing "investment strategies" involving the purchase and writing of options on foreign currencies, Dunn and Nopkine have made false, misleading and/or deceptive representations to existing and prospective customers of Nopkine, concerning, among other things, (a) the likelihood of profit, and the risk of loss, associated with trading options on foreign currencies and (b) the true status of the funds invested with Nopkine, including, but not limited to, statements made to at least one customer of Nopkine whose funds had been invested

in a position maturing on December 15, 1993, that Nopkine would (i) notify the customer immediately when the position had a 2.5% loss, (ii) discuss the position with the customer at loss levels of 2.5%, 5.0%, and 7.5% and (iii) close the position if the loss reached 10.0%.

26. At the time the statements referred to in paragraph 25 were made, Dunn and Nopkine either knew the statements were false or had no reason to believe they were true. For example, despite the representations referred to in paragraph 25, the customer lost 36% of the \$82,520.19 which he had invested in the position purportedly maturing on December 15, 1993.

27. Dunn, Delta Consultants, Delta Options and Nopkine are each directly liable for violating Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), and Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993).

28. Pursuant to Sections 13(a) and 13(b) of the Act, 7 U.S.C. §§ 13c(a) and 13c(b) (Supp. IV 1992), Dunn is liable for any violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), and Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993), by Delta Consultants, Delta Options, Nopkine and others, in that he willfully aided and abetted such violations and/or he, directly or indirectly, controlled persons including, but not limited to, Delta Consultants, Delta Options and Nopkine, and did not act in good faith or knowingly induced, directly or indirectly, the acts, omissions or failures constituting such violations.

V.

RELIEF REQUESTED

WHEREFORE, Plaintiff, the Commodity Futures Trading Commission, respectfully requests that this Court enter:

A. An *ex parte* Restraining Order prohibiting Defendants and their officers, agents, servants, employees, attorneys-in-fact, successors, assigns, directors, subsidiaries, affiliates and any other persons or entities in active concert or participation with any of them as well as any other person or entity who receives actual notice of such order by personal service or otherwise, directly or indirectly, from:

- (1) Withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property of Defendants, and any successors thereof, wherever situated, whether under their actual or constructive ownership, possession, custody or control, until further order of the Court;
- (2) Destroying, altering or disposing of the books, records, documents, correspondence, brochures, manuals, diaries, bank records, commodity trading records, customer lists, ledgers or other property of Defendants, and any successors thereof, wherever situated, until further order of the Court; and
- (3) Refusing immediate access to the Commission staff to the books and records of Defendants, and any successors thereof, wherever situated.

B. In the case of a bank or other depository which may have or could exercise custody or control over assets and books and records of the Defendants which are hereby enjoined from, among other things, withdrawal, transfer, removal, dissipation, disposal, destruction, alteration and refusal of immediate access to the Commission, such *ex parte* Restraining Order shall reach any such assets or records wherever situated, in or outside the United States, held by any holding company, branch, division, parent, subsidiary, correspondent, nominee, assign, agent or any person or entity which is in any manner related to any bank or depository receiving this order.

C. Orders of preliminary and permanent injunction, restraining and enjoining Defendants and any other officers, agents, servants, employees, attorneys-in-fact, successors, assigns, directors, subsidiaries and affiliates, and any other persons or entities in active concert or participation with them who receive actual notice of such order by personal service or otherwise, from, directly or indirectly, (a) cheating or defrauding, or attempting to cheat or defraud, any other person, (b) making or causing to be made to any other person any false report or statement thereof or causing to be entered for any person any false record thereof, or (c) deceiving or attempting to deceive any other person by any means whatsoever, in or in connection with an offer to enter into, the entry into or the confirmation of the execution of any commodity option transaction in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), or Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993);

D. An order appointing a temporary equity receiver, and subsequently a permanent equity receiver, to take immediate custody, control, and possession of all assets and property belonging to, or in the possession, custody and control of Defendants, and any successors thereof, including, but not limited to, books and records of account and original entry, electronically-stored data, funds, securities, commodity accounts, bank and trust accounts, real or personal property, premises, contents of safety deposit boxes, precious metals, currencies, coins, and any other assets wherever situated; and authorizing, empowering, and directing such receiver to collect and take charge of, hold and administer the same subject to further order of this Court, in order to prevent irreparable loss, damage and injury to customers of Defendants, and any successors thereof, and to conserve and prevent the dissipation of funds, and to remove Defendants and other management personnel from control and management of Delta Consultants, Delta Options and Nopkine, and to prevent further evasions and violations of the Act and Regulations by Defendants, and to have such other and further powers as this Court may direct.

E. An order directing that an accounting be made of all assets and liabilities of Defendants, and any successors thereof, together with all funds received and paid out, in or in connection with all commodity option transactions, from the dates Delta Options and Nopkine began operations, to and including the date of such accounting; together with an accounting of all salaries, commissions, fees, loans, and other disbursements of money and property of any kind, in or in connection with commodity option transactions, from the date Defendants began

operations, to and including the date of such accounting; and that such accounting shall be accomplished under the supervision of the equity receiver or such other officer as the Court may appoint or designate, or upon such terms and conditions as the Court may deem appropriate.

F. An order directing the Defendants, and any successors thereof, to disgorge to the equity receiver appointed herein or pursuant to such other procedure as the Court may order, all benefits received, including, but not limited to, salaries, commissions, fees, and trading profits derived, directly or indirectly, from acts or practices which constitute violations of the Act and Regulations as described herein.

G. An order of restitution directing Defendants to make whole each and every customer whose funds were received by the Defendants in violation of the provisions of the Act, as described herein;

H. An order rescinding all contracts entered into by Defendants with any customer; and

I. Any such other and further relief as the Court may deem necessary and appropriate.

Respectfully submitted,

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New York, New York
